

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

PENNSYLVANIA VIRTUAL	:	
CHARTER SCHOOL	:	
Employer	:	
	:	
and	:	Case: 04-RC-143831
	:	
PA VIRTUAL CHARTER EDUCATION	:	
ASSOCIATION, PSEA/NEA	:	
Petitioner	:	

**BRIEF OF PETITIONER, PA VIRTUAL CHARTER
EDUCATION ASSOCIATION, PSEA/NEA**

I. INTRODUCTION

The PA Virtual Charter Education Association, PSEA/NEA (hereinafter “the Association” or “Petitioner”) files this brief in opposition to the Pennsylvania Virtual Charter School’s (hereinafter “Respondent” or “Employer”) position that the Employer is exempt from National Labor Relations Board (hereinafter “Board”) jurisdiction under the Hawkins County¹ test. On January 5, 2015, the Association filed a Petition for Representation with the Board seeking to represent a group of professional employees employed by the Employer. A hearing was held on January 20, 2015 during which the only issue litigated by the parties was whether the Board has jurisdiction over the Employer.

II. STATEMENT OF MATERIAL FACTS

The Employer presented two witnesses, Dr. Joanne Barnett, CEO of the Pennsylvania Virtual Charter School, and Jose Parrilla, CFO of the Pennsylvania Virtual Charter School, to testify. (Tr. 9, 96). Dr. Barnett has worked for the Employer since July 2003. (Tr. 9). She does

¹ NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 6700 (1971).

not hold any certifications from the Pennsylvania Department of Education including teaching or administrative certifications. (Tr. 57). She has no Pennsylvania public school teaching experience. (Tr. 11). She was a K-12 public school classroom teacher in Massachusetts in the mid-1970s and in New Jersey in the early 1980s. (Tr. 11). She has no previous public school administrative experience. (Tr. 11, 57). She was previously an administrator in a private school. (Tr. 11). Mr. Parilla has worked for the Employer since 2002. (Tr. 96).

The Employer is a Cyber Charter School providing education to Pennsylvania students Kindergarten through 12th grade. (Tr. 18). Instruction is provided mainly via the internet, through online instruction. (Ex. E-1; see 24 P.S. 17-1703-A). The Pennsylvania School Code of 1949 (“Public School Code”) contains a sub component that specifically addresses Charter Schools within the Commonwealth, known as the “Charter School Law” (hereinafter “PCSL”). (See 24 P.S. 17-1701-A through 17-1750-A). Cyber Charter Schools are subject to the “Charter School Code” and not to the entire Public School Code or its applicable regulations.

(1) Except as otherwise provided in this article, a charter school is exempt from statutory requirements established in this act, from regulations of the State board and the standards of the secretary not specifically applicable to charter schools. Charter schools are not exempt from statutes applicable to public schools other than this act.

...
(7) A charter school shall only be subject to the laws and regulations as provided for in Section 1732-A or as otherwise provided for in this article.

24 P.S. 17-1715-A (footnotes omitted). More specifically, the PCSL, in 24 P.S. 17-1732-A, sets forth the provisions of the Public School Code applicable to charter schools and in 24 P.S. 17-1749-A, those provisions applicable to cyber charter schools. These sections outline the only provisions of the Public School Code with which the charter schools and the Pennsylvania Virtual Charter School must comply. The applicable provisions are quite limited in comparison

to the provisions of the Public School Code applicable to all of the 500 Public School Districts in Pennsylvania, of which Pennsylvania Virtual Charter School is not one. (Tr. 59). The Employer is also subject to Basic Education Circulars² which specifically address charter schools. (Tr. 48; Exs. E-8, E-10, E-11).

The PCSL defines a cyber charter school as an:

independent public school established and operated under a charter from the Department of Education and in which the school uses technology in order to provide a significant portion of its curriculum and to deliver a significant portion of instruction to its students through the Internet or other electronic means. A cyber charter school must be organized as a public, nonprofit corporation. . . .

24 P.S. 17-1703-A.

a. Employer's Charter

In February of 2001, a “founding board” of individuals was issued a charter by a local school district in order to operate a cyber charter school. (Tr. 14; Ex. E-1). In January of 2001, the Employer was incorporated as a nonprofit corporation through the Pennsylvania Department of State. (Ex. E-2). In September 2006, the Employer executed a charter agreement with the Pennsylvania Department of Education (hereinafter “PDE”). (Tr. 23; Ex. E-4). After the expiration of the September 2006 charter, the Employer’s charter was renewed in July of 2011 by PDE, and the Employer is currently operating under the July 2011 charter. (Tr. 19, 24; Ex. E-5).

In order to receive a charter, the Employer must submit a charter application or charter renewal application, the contents of which are outlined in the PCSL. (See 24 P.S. 17-1747-A; Tr. 30). Generally, an application consists of a description of (including supporting documents) the Employer’s structure, the way it provides education services, curriculum review,

² A Basic Education Circular (BEC) provides the Department of Education's guidance on the implementation of law, regulation and policy.

sustainability and future plans and other information. (Tr. 30; Ex. E-6). The Employer is also subject to audits and financial filing regulations. (Tr. 48-49, 99, 100-101, 104).

During the term of the charter, PDE may revoke a charter, or at its end, may decline to renew it for any of the reasons enumerated in the PCSL. (See 24 P.S. 17-1729-A, 24 P.S. 17-1746-A). Dr. Barnett testified that the Employer is also subject to the Sunshine Act, the State Ethics Act, the Pennsylvania Prevailing Wage Laws, “the open records law”, and “the public bidding laws”. (Tr. 35, 37-38, 51).

b. Employer’s Funding

Approximately 96-97% of the Employer’s funding comes from “sending” school districts.³ (Tr. 28, 97). A student may choose to leave a school district where he/she would have attended a “brick and mortar” school and attend any number of charter or cyber charter schools, including the Employer’s cyber charter school. (Tr. 27, 28). Public School Boards have the power to set and levy taxes in order to fund the cost of public education. (Tr. 82-83). The Employer’s Board of Trustees has no such power. (Tr. 82).

c. Board of Trustees

The Public School Code mandates that the Board of Directors in the Public School Districts in Pennsylvania must have nine elected⁴ members. (Tr. 59, 61). On the other hand, members of the Employer’s Board of Trustees are appointed by the other trustees after an application process. (Tr. 33, 60; Ex. E-7.) Dr. Barnett testified that trustees of the Employer are never elected by the general public. (Tr. 61). According to the Employer’s internal Amended Bylaws, the Board of Trustees may have five to nine members. (Tr. 59; Ex. E-7). The

³ Traditional “brick and mortar” public schools from which cyber charter students come. (Tr. 59). According to Dr. Barnett, the sending schools maintain “ownership of the students”. (Tr. 29).

⁴ Although the Public School Code allows for the appointment of a Board member for the remainder of the four year term in cases of death, resignation, etc., that appointment is only effective until the next School Board election. (Tr. 60, 64; See 24 P.S. 3-315).

Employer's Board of Trustees currently has six members. (Tr. 32, 60). Unlike an individual running for a School Board seat, in a Public School District in one of Pennsylvania's 500 Public School Districts, an individual applying to the Employer's Board of Trustees does not have to file a petition for election, gather signatures or provide financial disclosure statements pursuant to the Pennsylvania Election Code. (Tr. 61-62). Although the term of a School Board Member of a Public School Board is four years, according to the Public School Code, the Employer's Board of Trustees is not subject to that limit and its internal bylaws allow for a five year term without term limits. (Tr. 64, 65; Ex. E-7). The members of the Employer's Board of Trustees are not employed by PDE. (Tr. 87). Dr. Barnett testified that, according to her understanding, members of the Employer's Board of Trustees are "public officials" as defined by the state ethics law. (Tr. 35, 36).

Although the Public School Code requires that the members of the 500 Public School Boards reside in certain geographical areas in order to serve on a School Board, there are no such requirements for the members of the Employer's Board of Trustees. (Tr. 61). While Public School Code specifically addresses many aspects of a school board meeting, including what constitutes a quorum, where and when meetings must be held, provisions for allowance of public comment, and other matters, those provisions are not applicable to the Employer's Board of Trustees. (See 24 P.S. 17-1732-A; 24 P.S. 17-1749-A).

d. Employees

Although every individual working for a Public School who provides direct instruction must hold a teaching certificate from PDE, by law, only 75% of those providing direct

instruction at the Pennsylvania Virtual Charter School have to hold such a certificate.⁵ (Tr. 74). Any individual holding a teaching certificate in the Commonwealth is subject to the provisions of the Professional Educator Discipline Act, including those who work for the Employer, a Public School, parochial schools and private schools. (Tr. 81). Professional employees in Pennsylvania's Public Schools are required to be evaluated pursuant to the requirements of 24 P.S. 11-1123. These evaluation requirements, despite Dr. Barnett's testimony, are not applicable to charter school teachers. (See 24 P.S. 11-1123; 24 P.S. 17-1732-A; 24 P.S. 17-1749-A). While Public Schools must abide by the furlough and recall rights of employees set forth under the Public School Code, in 24 P.S. 11-1124 and 24 P.S. 11-1125.1, the Employer does not.⁶ (Tr. 77). Likewise, Public School Districts must provide professional employees specific due process rights when issuing discipline as outlined under the Public School Code; the Employer is not subject to those provisions of the Public School Code and therefore is not required to afford those rights. (Tr. 76-77; See 24 P.S. 11-1122; 24 P.S. 11-1127; 24 P.S. 11-1129; 24 P.S. 11-1130, 24 P.S. 11-1131, 24 P.S. 11-1132; 24 P.S. 17-1732-A; 24 P.S. 17-1749-A).

III. ARGUMENT

The Employer is not exempt from the Board's jurisdiction because it is not a political subdivision of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the National Labor Relations Act. Board precedent and a recent Regional Director's Decision establish that jurisdiction is proper before the Board. See Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012) (hereinafter "Chicago Math"); The

⁵ Although Dr. Barnett testified that all of the individuals providing direct instruction employed by the Employer must hold a Pennsylvania teaching certificate, this is an internal policy, and state law requires only 75% of the instructors to be certificated. (See 24 P.S. 17-1724-A(a)).

⁶ Dr. Barnett testified that the Employer has experienced a reduction in force and reduced the teaching staff as a result thereof. (Tr. 86, 90-91). Dr. Barnett testified that the Employer did not follow the furlough and recall provisions of the Public School Code with regard to the recent reduction in force as the provisions did not apply to the Employer. (Tr. 91-92).

Pennsylvania Cyber Charter School and the Pennsylvania Cyber School Education Association, PSEA/NEA, NLRB Case No. 06-RC-120811, Regional Director's Decision and Direction of Election (February 24, 2014), (hereinafter "PA Cyber"). In Chicago Math, the Board held that the Chicago Math & Science Academy Charter School (hereinafter "CMSA") was an "employer" for NLRA purposes, subject to Board jurisdiction. Specifically, it determined that CMSA was not a "political subdivision" of the state, despite the Illinois Charter School Law's express recognition that charter schools are public schools. The Board applied the two-part test set out in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971) ("Hawkins County") for determining whether an entity is properly considered a "political subdivision," which exempts from Board jurisdiction entities that are either: (1) created directly by the state so as to constitute a department or administrative arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. Similarly, in the recent decision in PA Cyber, the Regional Director found that employer was an employer within the meaning of Section 2(2) of the Act.⁷ Notably, the Employer in PA Cyber, the Pennsylvania Cyber Charter School (hereinafter "PaCCS"), was governed by the same Pennsylvania law at issue herein. The Regional Director, after applying the two-part Hawkins County test in PA Cyber, found that the employer was "not a political subdivision of the Commonwealth of Pennsylvania so as to be exempt from the Board's jurisdiction...." PA Cyber, slip op. at 17.

Applying the Hawkins County test to the instant facts, it is clear that the Employer is neither created directly by the state so as to constitute a department or administrative arm of the

⁷ The Board issued an Order denying the Employer's request for review. The Pennsylvania Cyber Charter School and PA Cyber School Education Association, PSEA/NEA, NLRB Case No. 06-RC-120811 (April 9, 2014).

government nor is it administered by individuals who are responsible to public officials or to the general electorate.

a. The Pennsylvania Virtual Charter School was not created directly by the state so as to constitute a department or administrative arm of the government.

An entity created directly by the state so as to constitute a department or administrative arm of the government is a “political subdivision” and therefore exempt from Board jurisdiction under the first prong of the Hawkins County test. 402 U.S. at 604. In Chicago Math, the Board determined that CMSA failed to satisfy the first prong of the test because it was “created by private individuals, and not by a government entity, special legislative act, or public official.” Similarly, in PA Cyber, the Regional Director found that “it was the instigation and initiation of action by private individuals which resulted in the establishment of the Employer, not any mandate, affirmative action, or direct intervention by a government entity.” Slip op. at 14 (footnote omitted). “The Board has consistently held that entities created by private individuals as nonprofit corporations are *not* exempt under the first prong of Hawkins County.” Chicago Math, 359 NLRB No. 41 at 6 (emphasis in original; footnote omitted).

In Chicago Math, the Board noted that the Illinois Charter Schools Law (“ICSL”) requires that a charter school be “organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois,” i.e., the Not-for-Profit Act. Id. at 2. The Board dismissed the ICSL’s labeling of charter schools as public schools as not controlling the issue of whether they are “political subdivisions.” Id. at 7. The Board found that CMSA was not *directly created by the State*, legislation or public official, but was created and incorporated by a group of private individuals as a not-for-profit corporation.

Id. The ICSL requires that a charter be created by a private individual who must first establish a private corporation, which in turn creates the charter school. Id.

We examine CMSA under the Illinois General Not-for-Profit Corporation Act and not under the Charter Schools Law because it is the statute that “authorized” CMSA’s creation. Indeed, the Charter Schools Law directs that a charter school must be ‘organized under the laws of the state of Illinois,’ i.e. the Illinois General Not-for-Profit Corporation Act. There is no Illinois statute that *directly creates charter schools*. Indeed, *absent the independent initiative of private individuals* and the Not-for-Profit Corporation Act, the Charter Schools Law would do nothing to bring charter schools into existence.

Id. (emphasis added).

Similarly, the Pennsylvania Charter School Law (“PCSL”) requires that cyber charters be “organized as a public, nonprofit corporation.” 24 P.S. 17-1713-A. In order to establish a public, nonprofit corporation, one must incorporate under the Domestic Nonprofit Corporations Statute through the Pennsylvania Department of State. Just as in PA Cyber, where the Regional Director found that the PaCCS was created by a group of private individuals, the Pennsylvania Virtual Charter School was created by group of *private individuals* who formed a non-profit corporation and cyber charter school. Those individuals incorporated through the Department of State in 2001. (Ex. E-2). No conduct of the State is necessary to initiate the proposal to create a charter school, and because no charter school would exist without the initiative of private individuals and the authority of the Domestic Nonprofit Corporation Law, the first prong of the Hawkins County test is not satisfied.

In Chicago Math, the Board went on to hold that an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a governmental entity, as did the CMSA. 359 NLRB No. 41 at 6. The Board noted that Illinois charter schools receive about 80% of their funding to operate from Chicago Public Schools, but the public schools do not advise CMSA as to how to allocate its budget. Id. at 3. Illinois charter schools are also required to

comply with statutes specified in the Charter School Law including, the State's Freedom of Information and Open Meetings Acts, employee background check laws, Abused and Neglected Child Reporting Act, the Illinois School Student Records Act, the Illinois Code pertaining to report cards and student discipline, as well other State and Federal Laws regarding individuals with disabilities and prohibiting discrimination. Id. at 2.

Illinois charter schools must also comply with teacher certification and assessment requirements, may not charge tuition, and are subject to performance evaluations and review by the local School Board issuing the charter. Id. at 2, 3, 4. Illinois charter schools are also required to comply with standardized testing procedures and assessments provided by the Illinois School Code. Id. at 3. Despite all of these facts, the Board determined that the CMSA was not a political subdivision of the State of Illinois, but viewed charter school operators as akin to government contractors.

In PA Cyber, where the Regional Director found jurisdiction was proper before the Board, the Regional Director reviewed the same law applicable to the instant matter. In the instant case, as in the Illinois charter schools, and in PA Cyber, the Pennsylvania Virtual Charter School receives public funding and operates pursuant to a contract with a governmental entity, but is free to allocate its budget as it sees fit, without instruction from either sending schools or PDE. (Tr. 49, 99). The Pennsylvania Virtual Charter School is subject to many of Pennsylvania state laws including the Commonwealth's Right to Know Act, the Sunshine Act, prevailing wage laws, teacher certification requirements,⁸ and several others, as were PaCCS and CMSA subject to state laws. The Pennsylvania Virtual Charter School must comply with Pennsylvania student testing and assessment laws. (See 24 P.S. 17-1715-A(8)). As in Chicago Math, and PA Cyber,

⁸ The PCSL requires that only 75% of those providing direct instruction in a Charter School be certified while 100% of teachers providing direct instruction at a public school must be certified. (24 P.S. 17-1724-A(a)).

these facts are not determinative and are more akin to a government contractor than an “arm of the government.”⁹

In PA Cyber, when reviewing the same Pennsylvania law applicable to the Employer in the instant case, the Regional Director rejected the employer’s argument that PDE oversight of its operations and the reporting requirements, which are mandated by Pennsylvania, evidence that it is responsible to and controlled by public officials. Instead, the Regional Director, in PA Cyber found that similar to CMSA, where

the Illinois school involved had reporting requirements and academic guidelines under Illinois law which were mandated, as well as statutory obligations under applicable state and Federal laws for educational institutions. That the employer was also required to make contributions to the Chicago Teachers’ Pension Fund for instructors.... The presence of these factors was not sufficient, in the Board’s opinion, to exempt CMSA from the Board’s jurisdiction. The record here does not support a conclusion that Pennsylvania’s oversight or reporting requirements for charter schools are more demanding than those of Illinois so as to justify a contrary result.

Slip op. at 15-16.

Additionally, under the PCSL, the charter school’s board of trustees, the governance structure of which is set out in the charter application, has the authority to “decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum and operating procedures, subject to the school’s charter,” and to “employ, discharge and contract with necessary professionals and nonprofessional employees subject to the school’s charter and the provisions of this article.” 24 P.S. 17-1716-A(a). The Employer’s operations and governance structure is controlled only by its Board of Trustees, and its Board created Amended Bylaws,

⁹ The Employer asserted, in its Position Statement, that dire consequences could result from a determination that the Employer is not a political subdivision and therefore subject to Board jurisdiction because of the impact on the Pennsylvania Secretary of Education’s ability to “seek an injunction when the union has been on strike long enough that the school entity will not be able to provide 180 days of instruction by June 30” as outlined in 24 P.S. 11-1161-A. (Employer Position Statement at 7). The PCSL, in 24 P.S. 17-1724-A provides that “A charter school shall be considered a school entity as provided for in section 1161-A for the purpose of the secretary seeking an injunction requiring the charter school to meet the minimum requirements for instruction as provided for in this article.” (24 P.S. 17-1724-A(a) footnotes omitted).

which, as will be pointed out below, is not responsible to public officials or the general electorate.

b. The Pennsylvania Virtual Charter School is not administered by individuals who are responsible to public officials or to the general electorate.

Under the second prong of the Hawkins County test, “an entity may be deemed a political subdivision if it is ‘administered by individuals who are responsible to public officials or to the general electorate.’” Chicago Math, 359 NLRB No. 41 at 7 (citing Hawkins County). In making this determination, the Board examines whether those individuals are appointed by or subject to removal by public officials. Id. As the Supreme Court stated:

Plainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as ‘individuals who are responsible to public officials or to the general electorate

Hawkins County, 402 U.S. at 608. Here, just as the Board found in Chicago Math and the Regional Director in PA Cyber, none of the Pennsylvania Virtual Charter School’s Board of Trustee members are appointed by or subject to removal by any public official. 359 NLRB No. 41 at 9; PA Cyber, slip op. at 15. After coming to this conclusion in Chicago Math, the Board determined that no further inquiry was required under the second prong. 359 NLRB No. 41 at 10.

In analyzing this prong in PA Cyber, the Regional Director noted that “[t]he Board has held that whether an employer’s governing board is subject solely to private appointment and removal is the critical and determinative factor in the second prong analysis.” Slip Op. at 14 (citing Chicago Math, 359 NLRB No. 41 at 9-10). The Regional Director, in PA Cyber, found that the employer failed “to meet the jurisdictional exemption test under the second prong of Hawkins. The record establishes that the Employer is not ‘administered by’ public officials as

no individual involved in the Employer's administration is responsible or has accountability to public officials or to the general electorate." Slip op. at 16.

In determining whether an entity is administered by individuals who are responsible to public officials or to the general electorate, the "Board examines whether the composition, selection and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents." Chicago Math 359 NLRB No. 41 at 8 (citing Charter School Administration Services, 353 NLRB 394, 397 (2008) (footnote omitted). The Board concluded that, where the appointment and removal of a majority of an entity's governing board members is controlled by private individuals, as opposed to public officials, the entity *will be subject to the Board's jurisdiction*.

The PCSL does not require a specific appointment/removal structure for trustees, but is permissive with respect to how the charter applicant will organize it. As was the board of trustees for PaCCS, the Pennsylvania Virtual Charter School's Board of Trustees is appointed and removed entirely by fellow Board members, as dictated by its Amended Bylaws. (Ex. E-7). Members of the Board of Trustees are not elected by the general electorate or appointed by public officials. There is no dispute that no person affiliated with PDE or any other state or local office has any involvement in the selection or removal of any members of the Employer's governing board.¹⁰ The Employer's Amended Bylaws address the reasons for which a trustee

¹⁰ While Dr. Barnett testified that trustees may be removed by PDE, no trustees of the Pennsylvania Virtual Charter School have been removed. (Tr. 87-88). In fact, the Auditor General's report identified the failure of members of the Employer's Board of Trustees either to file or filed late their financial disclosure statements under the Ethics Act. (Tr. 45; Ex. E-9). There is no evidence that the PDE or any other public official removed any members of the Board of Trustees as a result of these failures. The Auditor General's report identified penalties for failure to comply with the Ethics Act, which did not include the removal by PDE or any other public official of a member of the Board of Trustees. (Ex. E-9 at 12). The PCCL provides that trustees may be immediately disqualified from serving on the board of trustees for conviction of a felony or any crime involving moral turpitude. (See 24 P.S. 17-1729-A(b)). When questioned, Dr. Barnett was unable to identify any specific section of the Public School Code or the PCSL providing for PDE to remove a member of the Board of Trustees. (Tr. 63-64).

may be removed, all of which require *a majority vote of the existing board of trustees*, not action of any official from PDE or any other state or local office. (Ex. E-7).

Notably, Dr. Barnett's attempt to equate the inclusion of information concerning governance of the school, as well as the method of the selection of members of the Board of Trustees in the annual report and in the charter renewal applications, *after* any vacancies had been filled, does not equate with PDE's direct oversight and input into the selection of the members of the Board of Trustees. PDE has no involvement in the selection of members of the Board of Trustees prior to their selection. A reporting requirement to the Department of Education does not rise to the level of administration by public officials or accountability to public officials as required by Hawkins County. To the contrary, the other members of the Board of Trustees, private individuals, are the only individuals involved in the selection of new members. The members of the Employer's Board of Trustees never stand for election by the general electorate.

The Board, in Chicago Math, similarly found that the governing body of the CMSA was appointed and subject to removal *only* by CMSA Board members and not by public officials. It determined that, given the undisputed method of appointment and removal of CMSA's board members, none of CMSA's board members are "responsible to public officials" in their capacity as board members and therefore, CMSA is not "administered" by individuals who are responsible to public officials or the general electorate. 359 NLRB No. 41 at 9. The Regional Director, in PA Cyber, properly noted the Supreme Court held "that Federal, not state law governs the determination under Section 2(2) of the Act whether an entity created under state

law is a “political subdivision” and not an employer subject to the jurisdiction of the Board.” PA Cyber, slip op. at 15 (citing Hawkins County, 402 U.S. at 603).¹¹

Although Dr. Barnett made several conclusory statements that PDE provides oversight and requirements for the Employer, her testimony was based upon her understanding,¹² (Tr. 57:18-22) it is clear that because they are appointed and subject to removal only by other Board of Trustee members and not any public official or public electorate, the second prong of the Hawkins County test has not been met.

c. Pennsylvania Labor Relations Board Decisions.

Following the Board’s decision in Chicago Math, the Pennsylvania Labor Relations Board (“PLRB”) dismissed two unfair labor practice charges and one representation petition against a cyber charter and a charter school operating in the Commonwealth citing lack of jurisdiction under the Pennsylvania Labor Relations Act (“PLRA”). In both nearly identical decisions, the Hearing Examiner found that the Agora Cyber Charter School and New Media Technology Charter School were not political subdivisions under the PLRB’s jurisdiction. See Agora Employees Educ. Ass’n, PSEA/NEA v. Agora Cyber Charter Sch., 45 PPER 6 (2013), Alliance of Charter Sch. Employees Local 6056 AFT v. New Media Technology Charter Sch., 45 PPER 8 (2013).

In both decisions, the Hearing Examiner’s analysis focused on the composition of the charters’ boards and found that the members of each charter school’s board were not publicly

¹¹ Petitioner acknowledges and directs the Board’s attention to the fact that Section 1715-A of the Pennsylvania Charter School Law defines members of a charter school’s board of directors as “public officials.” 24 P.S. 17-1715-A(11) Ex. E-5. Likewise, charter school administrators are public officials under the law for purposes of ethics standards and financial disclosures under 65 Pa. C.S. Ch. 11. See 24 P.S. 17-1715-A(12). Violations under that section are subject to penalties imposed by the State Ethics Commission. The State Ethics Commission, consistent with the language of the Charter School Act, treats heads of school and trustees of charter schools as public officials under the Public Official and Employee Ethics Act, 65 Pa. C.S. 1101 et seq. The Charter School Law also provides that employees of charter schools may organize under the Pennsylvania Public Employee Relations Act and that the board of trustees of a charter school shall be considered a public employer under the Act. 24 P.S. 17-1724-A(a).

¹² Dr. Barnett is not now and has never been an employee of the PDE. (Tr. 57).

elected nor appointed or removed by public officials. Id. He also determined that because the National Labor Relations Board directly asserted jurisdiction over charter schools in the Chicago Math case, that the employer is therefore exempt from PLRA jurisdiction, citing Section 301 of the PLRA, which expressly provides that a “public employer” “shall not include employer covered or presently subject to coverage under . . . the ‘National Labor Relations Act’” 43 P.S. 1101.301(1).

In Chicago Math, the National Labor Relations Board asserted jurisdiction over charter schools under Charter School Laws similar to the Commonwealth’s Charter School Law, and under facts nearly identical to the ones presented here. Subsequently, the Pennsylvania Labor Relations Board has dismissed petitions involving Pennsylvania charter schools citing lack of jurisdiction under the Pennsylvania Labor Relations Act. Most recently, in PA Cyber, the National Labor Relations Board asserted jurisdiction over a cyber charter school under the same law governing the Employer herein, and facts nearly identical to the ones in this matter. Charter schools and specifically, cyber charter schools are, therefore, private employers and fall within the jurisdiction of the National Labor Relations Act.

IV. CONCLUSION

Based upon the foregoing, the Petitioner Labor Organization respectfully submits that the Respondent’s objection to the Board’s jurisdiction be denied.

Respectfully Submitted,



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January 30, 2015

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FOURTH REGION**

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CHARTER SCHOOL	:	
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Employer	:	
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and	:	Case: 04-RC-143831
	:	
PA VIRTUAL CHARTER EDUCATION	:	
ASSOCIATION, PSEA/NEA	:	
	:	
Petitioner	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Petitioner, PA Virtual Education Association, PSEA/NEA, was served this 30th day of January, 2015, upon the following individuals via Electronic Mail and United States First Class Mail.

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